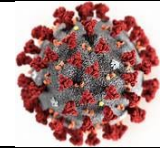


National COVID-19 Science Task Force (NCS-TF)



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In response to request from:

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Comment on planned updates :

Title: Ethical, legal, and social issues associated with “serological passports”

Summary of request/problem : The Scientific task force was tasked with refining aspects of possible transition strategies. The Ethical, legal, and social group examined the ethical, legal, and social aspects of serological passports.

Executive summary: The Ethical, legal, and social group of the Scientific task force concludes that as long as scientific uncertainty in identifying immunity and its duration persists, **such passports should not be used as they restrict human rights, create societal dangers, and cannot be justified by a legitimate public interest.** Before the state can use serological passports, or link legal consequences to their possession, we must be certain that they actually document immunity, and we must know more about the extent and duration of the immunity they document. As long as this is not the case, extreme caution seems to be the only option.

If scientific uncertainty could be lifted, a number of ethical and legal rules would need to be in place to enable a justifiable implementation of immunity certificates. These rules would need to eliminate or at least substantially mitigate harms to persons, and guarantee equal rights, including the right to access testing, and protect solidarity. Mandatory testing would require a legal basis, as would the processes to establish serological passports. The federal data protection officer should be included into all plans about establishing special health documents, as should the Swiss national advisory commission on biomedical ethics. Given the proliferation of tests, including home-testing, accreditation for serological testing would also need to be legally regulated. The government must also provide enough support for those who cannot profit from the privileges conferred by serological passports.

Strict limitations on the scope and duration of serological passports would need to be implemented from their inception onwards.

Main text

In different countries, outlines of deconfinement strategies include tools aiming to certify the immune status of individuals to SARS-Cov2. Such “serological passports” or “immunity certificates” require proof of each person's immune status, and respect of ethical rules and the protection of personal data. This individual certification is different from the need to assess the serological status of a population, in order to visualize and manage the effectiveness of a deconfinement health plan in real time. It is also different from individual testing with results returned only to individuals who were tested.

The Ethical, legal, and social group of the Scientific task force examined the ethical, legal, and social aspects of serological passports and concludes that as long as scientific uncertainty in

identifying immunity and its duration persists, **such passports should not be used as they restrict human rights, create societal dangers, and cannot be justified by a legitimate public interest.**

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If scientific uncertainty could be lifted, a number of ethical and legal rules would need to be in place to enable a justifiable implementation of immunity certificates. These rules would need to eliminate or at least substantially mitigate harms to persons, and guarantee equal rights, including the right to access testing, and protect solidarity. Mandatory testing would require a legal basis, as would the processes to establish serological passports.

Resolving technical issues does not imply that the technology will be easily accepted and implemented. Next to questions raised by the general population and specific subgroups, likely acceptability among health professionals should not be overstated. Difficulties described in regard to e-health and electronic files of the patient in Switzerland (De Pietro & Francetic, 2018) could also matter for the implementation of serological passports (notably institutional and organizational fragmentation).

The measures currently in place were implemented both for the protection of individuals themselves and for the protection of others. Any measures that are in place for the protection of individuals themselves should freely adhered to, or not, irrespective of immunity status. For measures aimed at protecting others, transgressions of individual liberty can be justified. In such cases, however, criteria for the immune and the non-immune should reflect the same conditions of necessity, subsidiarity, proportionality, reversibility, and documentation. Of these conditions, only reversibility and documentation will be easily fulfilled. Generally, the subsidiarity for serological passports will only be fulfilled if no alternative exists to contain the epidemic and restart required sectors of the economy with less infringements of principles and of the rights of individuals. Serological passports would thus have to be credible as a replacement, or at least a real added value, to test-trace-isolate-quarantine strategies.

Harm to persons

Serological passports » could harm persons. The « immune » may not be immune, and could take excessive risks. For example, immunity status should not be used to prioritise personal protective equipment to non-immune health professionals as long as uncertainty as to the degree and duration of immunity persists. The « non-immune » may seek contagion if immunity carries social advantages.

A risk of two-tiered citizenship

One of the stated purposes of serological passports is to allocate different rights and duties to the immune and to the non-immune. This would

Create inequalities based on health

To avoid discrimination, any differential treatment of the immune and the non-immune would

have to nevertheless respect the equal rights of everyone. Frameworks based on human rights, capabilities, or any other framework of fundamental rights could help to identify whether this might be done and if so how.

At minimum, conventions and laws protecting the **rights of the disabled** should be applied to non-immune individuals in countries that reopen and would like to make full access to society conditional on immunity. As long as no vaccine was available, this could be the first disability to affect a majority of the population. To ensure equal rights in a situation where physical risk differs between individuals, starting with frameworks for the rights of the disabled could represent a red line.

An approach based on **capabilities** would highlight the importance of equal access for the immune and non-immune to the protection of: life, bodily health, bodily integrity, senses, imagination and thought, emotions, practical reason, affiliation including social interaction and the social bases of self-respect, contact to other species, play, and control over one's political and material environment (Nussbaum 2000). Particular attention should thus be paid to maintaining equal protection of life in all circumstances, but also equal political rights, equal possibilities for social interaction, for play, and most importantly perhaps equal access to the social bases of self-respect: the image mirrored back to us by society, which constitutes an important part of our assessment of our own worth. This could for example be particularly endangered by a paradigm where the immune would be counted on to do most of the work in the public sphere, with the justification that this protects the non-immune whose major duty becomes to stay out of the way of harm. Such a paradigm would risk exploiting the immune, but also trapping the non-immune in the role of a potential victim rather than a full agent in society.

The government must in such a situation provide enough support for those who cannot profit from the privileges conferred by serological passports. Unemployment coverage for those who have not obtained an immunity certificate would therefore be a big issue. According to anti-discrimination law, "no person may be discriminated against, in particular on grounds [...] of a physical, mental or psychological disability" (Art. 8 para. 2 Swiss Constitution).

Increase stigmatization and marginalization

In a context of upcoming economic recession, serological passports could be used to grant access or refuse access to other resources, such as health care, unemployment benefits, etc. Such secondary potential misuses should be anticipated.

An important risk of stigmatization exists as well. Biological information has far-reaching social implications and serological passports will create different categories of people. Historically, frontiers between countries, social groups or epidemiological categories have always been integrated in social and cultural interpretations of diseases, especially when they are infectious (Joffe, 1999). Along these interpretations, discrimination and stigmatization based on these frontiers are also recurrent social mechanisms, used to provide a sense of self-immunity by distancing oneself from those 'at risk or dangerous' (Douglas & Wildawsky, 1983). Serological passport can be expected to generate such processes.

Make it impossible to keep immunity status confidential

Keeping information on a passport private is technically possible, but the federal data protection officer should be included into all plans about establishing special health documents.

Keeping information private when that information leads to different tasks and/or rights is not socially possible. Breach of privacy must therefore be assumed. It can be ethically justified if it

fulfills the criteria listed under “individual liberty”. The criterion of necessity seems particularly difficult to fulfill in this case.

Solidarity

Identification of the immune and non-immune, whether accurate or not, could diminish solidarity by pointing that everyone’s risk is no longer equal.

Serological passports increase the potential for discriminating against those who don’t have a passport because they’re not immune largely on account of the fact that they complied with public health measures. This will pit individual interests in becoming immune against collective interests that public health measures be implemented, and may end up undermining the entire *raison d’être* of the public health project by questioning the importance and necessity of public health measures implemented for the common good. Compliance with public health restrictions may be the greatest show of global solidarity we may ever see. We should leverage that, not undermine it.

Equal access to testing

The Swiss Federal Office of Public Health published a pandemic response plan in 2018 after consulting with various stakeholders (FOPH, 2018). Section 6.4, on which the National Ethics Commission was a consultant, deals with “Principles for the distribution of scarce preventive resources”. These principles can be applied by analogy for the distribution of scarce resources aimed at limiting the spread of a pandemic and should be applied here.

Passports would also have to be available for allophone persons, undocumented persons, people in need - and people without cars (excluded from drive-through testing).

Required legal bases

Testing, if mandatory, would require a legal basis. Processes to establish serological passports » would also require a legal basis (including access to it, consequences, appeal). Access to serological passports should be regulated by law. The question of who can get tested and who is obliged to undergo testing also would have to be clarified by law. The same goes for all questions related to the costs of testing.

Before the state proceeds to any testing, the consequences involved for passport holders must be clarified by law. Do “positives” get exemptions from lock down rules? Will they have special duties? Will employers be allowed to require testing? Are they allowed to have a differentiated regime for passport holders and others? What about hospitals, schools, universities? What about hairdressers and other people offering services where social distancing is impossible? Can they only go back to work when tested positively? If passport holders enjoy privileges (access to work, public transport), special measures would be necessary to guarantee equality and prevent direct and indirect discrimination.

If certificates create a two-tiered workforce, the process bears a potential for people to act fraudulently. Thus, the problem does not only consist in how certificates or passports are provided but also how to verify tests.

If there is an obligation to do a test and if legal consequences are linked to having or not having a certificate, an effective judicial remedy must be available.

Given the proliferation of tests, including home-testing, accreditation for serological testing would also need to be legally regulated.

Connotations

Should such immunity certification be used, we would also strongly suggest not to present such a tool as a „passport“. We would also recommend to combine the new tool with strong legal limitations from the very beginning onwards. Health passports were part of the fascist ant-malaria campaign in Italy and used for the surveillance of migrant workers. The use of health passports was also a measure of colonial policy surveillance. Health passports arose in the racist environment of eugenics (to specify healthy human beings, the „new man“). The combination of fast data processing (Hollerith machine at these times) and data collecting based on the cooperation of hospitals, public health administrations, and insurance, are usually seen as the administrative precondition for the holocaust.

Conclusion

Such passports should not be used as they restrict human rights, create societal dangers, and cannot be justified by a legitimate public interest.

If scientific uncertainty could be lifted, a number of ethical and legal rules would need to be in place to enable a justifiable implementation of immunity certificates. These rules would need to eliminate or at least substantially mitigate harms to persons, and guarantee equal rights, including the right to access testing, and protect solidarity. Mandatory testing would require a legal basis, as would the processes to establish serological passports. The federal data protection officer should be included into all plans about establishing special health documents, as should the Swiss national advisory commission on biomedical ethics. Given the proliferation of tests, including home-testing, accreditation for serological testing would also need to be legally regulated. The government must also provide enough support for those who cannot profit from the privileges conferred by serological passports.

Strict limitations on the scope and duration of serological passports would need to be implemented from their inception onwards.

Unresolved issues

1.

References

De Pietro, C., & Francetic, I. (2018). E-health in Switzerland: The laborious adoption of the federal law on electronic health records (EHR) and health information exchange (HIE) networks. *Health Policy*, 122(2), 69–74. <https://doi.org/10.1016/j.healthpol.2017.11.005>

Douglas, M., & Wildawsky, A. (1983). *Risk and Culture: An Essay on the Selection of Technological and Environmental Dangers*. University of California Press; papier.

Joffe, H. (1999). *Risk and "the other."* Cambridge University Press

Nussbaum M. Women's capabilities and social justice. *Journal of Human Development*. 2000;1(219-247)

Swiss Federal Office for Public Health. *Swiss Influenza Pandemic Plan. Strategies and measures to prepare for an influenza pandemic in Switzerland 2018, 5th edition*

Appendices
